

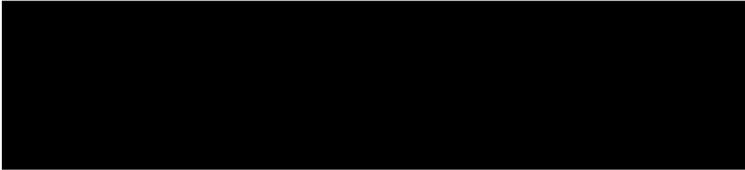
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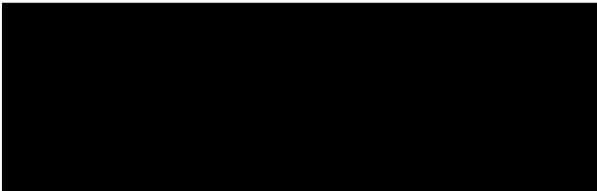
FILE: SRC 05 088 50890 Office: TEXAS SERVICE CENTER Date: **AUG 06 2007**

IN RE: Petitioner:
Beneficiary:



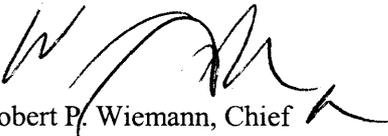
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The director of the service center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner operates as a membership organization and provides marketing expertise to more than 600 Best Value Inn (BVI) hotels. It seeks to employ the beneficiary as a sales support and marketing director. The petitioner, therefore, endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The director denied the petition because the proffered position is not a specialty occupation. The director also found the beneficiary ineligible for an extension of stay because she was out of status at the time of filing. The director also noted that a prior petition (SRC 05 013 52196) filed on behalf of the beneficiary by the petitioner for the same position was denied and a subsequent appeal was dismissed by the AAO.

Pursuant to 8 C.F.R. § 214.1(c)(5), there is no provision for an appeal from the denial of an application for extension of stay filed on Form I-129 or I-539. As this office does not have jurisdiction over the portion of the director's decision regarding the beneficiary's request for an extension of stay, this issue will not be reviewed.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) the Form I-290B, with the petitioner's statement of support. The AAO reviewed the record in its entirety before reaching its decision.

The issue before the AAO is whether the proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the

attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

Citizenship and Immigration Services (CIS) consistently interprets the term "degree" in the above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

To determine whether a particular job qualifies as a specialty occupation, CIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

The petitioner seeks the beneficiary's services as a sales support and marketing director. Evidence of the beneficiary's duties includes: the Form I-129; the petitioner's January 27, 2005 letter in support of the petition; and the petitioner's September 27, 2005 response to the director's request for evidence. As stated by the petitioner, the proposed duties are as follows:

- Conduct research on hotel industry trends, e-commerce best practices and competitive research for the purpose of assisting the petitioner in positioning itself competitively in its industry;

- Profile hotel industry segments, locate and pre-qualify potential guest target markets and communicate findings to the petitioner's management team to help them direct the marketing budget accordingly;
- Research competitors on an ongoing basis to ensure that the petitioner is keeping up with current trends;
- Create SWOT and competitive analyses on existing and emerging competitors to ensure proper positioning and increase market share;
- Create PowerPoint presentations on all research and present findings to the management team;
- Work with the petitioner's New Member Relations Department in locating new properties;
- Create and implement marketing programs and materials; and
- Provide a sales support assurance program and handle guest relations.

The director found that the proposed sales support and marketing director duties do not require a bachelor's degree. Citing the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*, the director noted that the minimum requirement for entry into the position was not a baccalaureate degree or its equivalent in a specific specialty. The director concluded that the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, the petitioner's CEO asserts, in part, that the director failed to thoroughly review the submitted documentation and denied the petition in error. He also asserts that the proffered position combines the duties of a marketing manager position and a market research analyst position. He states that the record contains two expert opinions, magazine articles, and job advertisements to show that the proffered position qualifies as a specialty occupation. He also contends that the petitioner's prior and current sales support and marketing directors hold a related bachelor's degree.

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

The AAO turns first to the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; a degree requirement is common to the industry in parallel positions among similar organizations; or a particular position is so complex or unique that it can be performed only by an individual with a degree. Factors often considered by CIS when determining these criteria include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms

"routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999)(quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. The AAO does not concur with the petitioner that the proffered position is a specialty occupation. No evidence in the *Handbook*, 2006-07 edition, indicates that a baccalaureate or higher degree in a specific specialty is required for a marketing manager position. A wide range of educational backgrounds is suitable for entry into marketing manager jobs, but many employers prefer individuals with related experience and a broad liberal arts background. The petitioner submits labor market information from the website <http://www.labormarketinfo.com/systems>, which reflects the recommended education level for marketing managers as "work experience plus bachelor's degree." This information supports the finding from the *Handbook* that there is no specific degree requirement for the position of marketing manager. The petitioner asserts on appeal that the proffered position entails some of the duties of a market research analyst. A review of the Market and Survey Researchers category in the 2006-07 *Handbook* does not indicate that a bachelor's degree in a specific specialty is required for a market research analyst position. While the *Handbook* indicates that a degree is generally required, it indicates that a wide variety of courses will prepare a person to perform the duties of a market research analyst. The petitioner did not provide a description of duties in a market research analyst-related field that corresponds to the *Handbook* and that would require a master's degree. In view of the foregoing, the position does not satisfy the regulatory requirement for eligibility as a specialty occupation under the first criterion.

The AAO acknowledges the excerpts from *O*Net* and the *DOT* assigning a marketing manager occupation a Job Zone category of 4 and a specific vocational preparation (SVP) of 7 to 8, which represents a combination of training and experience over two years and up to and including four years. The petitioner's reference to and assertions about the relevance of information from *O*Net* and the *DOT*, however, are not persuasive. Neither the *DOT*'s SVP rating nor a Job Zone category indicates that a particular occupation requires the attainment of a baccalaureate or higher degree, or its equivalent, in a specific specialty as a minimum for entry into the occupation. An SVP rating and Job Zone category are meant to indicate only the total number of years of vocational preparation required for a particular position. Neither classification describes how those years are to be divided among training, formal education, and experience, nor specifies the particular type of degree, if any, that a position would require.

The record contains three expert opinions, one of which is from a university professor, who concludes: "Normally [a] Sales Support and Marketing Director position, such as the position in this matter, is filled through recruiting a college graduate in business administration specializing in marketing or equivalent field." The second opinion letter is from another university professor, who concludes: "A person with a minimum of a Bachelor's degree would typically fill the position of Marketing Director and Sales Support for this size and type of business. This person should have a Bachelor's degree in marketing since the knowledge required for the described position is very specialized." Both opinions presented fail to include a discussion of the actual work the beneficiary would perform within the context of this particular petitioner's business, but rely on a general overview of the proposed duties. The authors do not indicate that they interviewed the beneficiary or the petitioner or relate personal observations of the petitioner's operations or of the work that the beneficiary

would perform. They do not state that they have reviewed any projects or work products related to the proffered position. Their opinions do not relate their conclusions to specific, concrete aspects of this petitioner's business operation demonstrating a factual basis for their conclusions about the nature of the proffered position. CIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, CIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

The third opinion letter is from the president and CEO of a hospitality solutions business, who concludes: "It is the norm in the industry for companies, even smaller than yours, that the position of which we spoke would well prefer a bachelor[']s degree or higher." Again, this information supports the finding from the *Handbook* that there is no specific degree requirement for the position of marketing manager. Further, employer preference is not synonymous with the normally required language of the regulation. The petitioner has failed to establish the proffered position as a specialty occupation under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Turning to the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), the AAO has considered the Internet job postings for positions related to sales and marketing in the record. The listings provided either fail to offer meaningful descriptions of the positions advertised or rely on duties unlike the duties listed by the petitioner. Also, the majority of the advertisers do not specify the requirement of a bachelor's degree in a specific specialty, which supports the finding from the *Handbook* that there is no specific degree requirement for the position of marketing manager. Further, the listings do not indicate that the businesses publishing the advertisements are similar to the petitioner in size, number of employees, or level of revenue. The record also does not include sufficient evidence from individuals, firms, or professional associations regarding an industry standard. Accordingly the petitioner has not established that the degree requirement is common to the industry in parallel positions among similar organizations.

In the alternative, the petitioner may show that the proffered position is so complex or unique that only an individual with a degree can perform the work associated with the position. In the instant petition, the petitioner has submitted insufficient documentation to distinguish the proffered position from similar but non-degreed employment. The AAO acknowledges the professor of marketing's opinion that the "Sales Support and Marketing Director position at Best Value Inn is so unique and specialized that it can only be performed by an individual with a degree." Again, however, the professor does not substantiate his conclusions with an explanation of each duty and how the generally described duty corresponds to particular courses in a four-year university. Moreover, as observed above, the failure to substantiate the opinion with a factual foundation based on an analysis of the beneficiary's actual work in conjunction with an analysis of the petitioner's operations undermines the conclusions reached. The petitioner has failed to establish the proffered position as a specialty occupation under either prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

For the reasons discussed above, the petitioner has not satisfied any of the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position. On appeal, counsel states that the petitioner’s prior and current sales support and marketing directors hold a related bachelor’s degree. The record contains copies of the bachelor’s degrees in business administration for [REDACTED] and [REDACTED]. The record also contains an Internet article in which [REDACTED] states as follows:

My hotel career started in high school when I was required to begin tailoring my classes toward my desired profession. Soon after, I was contacted by my future mentor, [REDACTED] (founder, president and [CEO] of Americas [BVI]) who knew me through family and friends. During the summer months, I worked in one of the first [BVI]s, learning the ins and outs of maintenance, housekeeping, operations, and sales and marketing. This provided me with the understanding of how each facet of the hotel must run efficiently and together as a team for the property to be profitable. Upon graduation I approached Roger for a full-time job as the [general manager] for the Las Vegas [BVI]. The 9/11 tragedy had drastically impacted the Las Vegas market, and the opportunity available was to join the corporate team to focus on implementing the [petitioner’s] global reservation system, which included my first task of migrating our legacy system to our new proprietary reservation system. The seamless and successful move jump-started my career to vice president. I now oversee all aspects of our worldwide reservation technology system.

[REDACTED] statements indicate that he performed marketing duties as an undergraduate. The record contains no evidence that he performed the proposed duties of the proffered position after obtaining his bachelor’s degree. Nor does the record contain evidence that [REDACTED] currently performs the proposed duties of the proffered position. Moreover, the AAO notes that while a petitioner may believe that a proffered position requires a degree, that opinion cannot establish the position as a specialty occupation. Were CIS limited solely to reviewing a petitioner’s self-imposed requirements, then any individual with a bachelor’s degree could be brought to the United States to perform any occupation as long as the employer required the individual to have a baccalaureate or higher degree. *See Defensor v. Meissner*, 201 F. 3d at 384. Accordingly, the petitioner has failed to establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) based on its normal hiring practices.

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) – the nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

The petitioner states, on appeal, that both university professors concluded that the proposed duties are so unique and specialized that only a person with a bachelor’s degree would qualify for the position. The information in the record about the proposed duties does not establish that they exceed in scope, specialization, or complexity those usually performed by marketing managers, an occupational category for which the *Handbook* indicates no requirement for or usual association with a baccalaureate or higher degree in a specific specialty. It is also noted that the record contains a letter from the president and CEO of Dream Catcher, who states that the candidate for the proffered position should have the “minimum of a 4 year degree and perhaps some post graduate studies as well.” He, however, does not specify a degree in a specific

specialty. Again, this information supports the finding from the *Handbook* that there is no specific degree requirement for the position of marketing manager. To the extent that they are depicted in the record, the duties are not so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree in a specific specialty. The petitioner has failed to provide sufficient information regarding the proffered position to enable the AAO to conclude that the duties are specialized or complex. Therefore, the evidence does not establish that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed. The petition is denied.